

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

JUN 15 2005

U. S. DISTRICT COURT
E. DIST. OF MO.
ST. LOUIS

EAST MAIN BAPTIST CHURCH, NORMA)
DUCOMMUN, SUSAN DUEVER, DOROTHY)
EARLE, JOHN SHULTHEIS, COMMERCIAL)
MORTGAGE & FINANCE COMPANY,)
individually and as representatives of a class of)
similarly situated persons,)

Plaintiffs,

vs.

UNION PLANTERS BANK, N.A., f/k/a MAGNA)
BANK, N.A.; MARSHALL & STEVENS, INC.;)
MICHAEL J. DOSTER; DOSTER, JAMES,)
HUTCHISON & ULLOM, P.C.; ROBERT A.)
CHLEBOWSKI; LYNNETTE A. FROWNFELTER;)
VARILEASE CORPORATION; J.E. LISS &)
COMPANY, INC.; and JEROME E. LISS;)

Defendants.

UNION PLANTERS BANK, N.A.,)

Third-Party Plaintiffs,

vs.

J.E. LISS & COMPANY, INC.; and JEROME E.)
LISS;)

Third-party Defendants.

05cv0962cas

Case No. **05cv0962cas**

JURY TRIAL DEMANDED

MICHAEL J. DOSTER; and DOSTER, JAMES,
HUTCHISON & ULLOM, P.C.;

Third-Party Plaintiffs,

and MARSHALL & STEVENS, INC.;

Third-Party Plaintiff/Third-party Counter-
Defendant

vs.

J.E. LISS & COMPANY, INC.; LISS FINANCIAL
SERVICES; RED OAK FINANCIAL, INC.;
JEROME E. LISS; MICK McDERMOTT;
WILLIAM GLASER; CUTTER & COMPANY
INC.; DAVID P. BAX; and ARAGON FINANCIAL
SERVICES, INC.;

Third-party Defendants;

and JEROME E. LISS;

Third-party Defendants/Third-Party
Counterclaimant;

and J.E. LISS & COMPANY, INC. d/b/a LISS
FINANCIAL SERVICES;

Third-party Counterclaimant.

NOTICE OF REMOVAL

COMES NOW Defendant Union Planters Bank, N.A. ("Bank"), by and through its attorneys, pursuant to 28 U.S.C. §§ 1441 and 1446, and hereby gives notice that it has removed the above-entitled case from the Circuit Court of St. Louis County, Missouri to the United States District Court for the Eastern District of Missouri, Eastern Division, because the Third Amended Class Action Petition, as amended, raises a federal question. In support of its Notice, Bank states the following.

1. Plaintiffs originally filed this case in the Circuit Court of St. Louis County, Missouri on November 12, 1999. (See Ex. 2 (Class Action Petition, filed Nov. 12, 1999).)

2. On May 17, 2005, Plaintiffs filed a Motion for Leave to File Plaintiff's Third Amended Class Action Petition. (*See* Ex. 1 (Minute Entry).) Leave to file was granted on June 2, 2005. (*Id.*)

3. Plaintiffs revised their proposed pleading and on June 8, 2005, filed their Third Amended Class Action Petition. (Ex. 261 (Third Amended Class Action Petition, filed June 8, 2005).)

4. This cause is a civil action involving allegations by individuals who purchased a series of bonds issued by the Arch Leasing Corporation Trust. It seeks damages on behalf of the named plaintiffs and other similarly situated individuals.¹ The Plaintiffs' claims include misrepresentation, fraud, breach of contract, breach of fiduciary duty, negligence, etc. In their Third Amended Class Action Petition, for the first time, Plaintiffs assert claims based on alleged misrepresentation or omission in connection with the purchase or sale of a covered security, more specifically alleging, *inter alia*:

That the aforesaid negligent, careless, knowing and intentional actions on the part of Defendants Liss and Liss & Company constituted violation and breach of Missouri Common Law, Federal Common Law and Missouri and Federal Securities Regulations including, but not limited to, The Securities Act of 1933 and 1934, 15 U.S.C.A. Sec. 77 & 78, including Rule 10b-5 of the Securities and Exchange Commission, adopted pursuant to Section 10b of 15 U.S.C.A. Sec. 78j(b).

(*Id.* at ¶ 262(f).)

5. Accordingly, this action is removable pursuant to 28 U.S.C. §§ 1441 & 1446 and 15 U.S.C. §§ 77p(c) & 78bb(f)(2). This court has jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C. §§ 78bb(f) and 77(p). Although Plaintiffs have cloaked their Third Amended Class

¹ Although this action has proceeded in state court as a class-action, Defendants do not concede that this action may properly proceed as a class action. *See State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729 (Mo. 2004) (granting writ of prohibition in this case and requiring trial court to determine whether case may proceed as class action).

Action Petition with descriptions of state-law claims, the claims regarding misrepresentation and omission asserted therein are governed exclusively by federal law, are pre-empted completely from state regulation or adjudication and/or raise a substantial federal question.

6. In addition, this court has jurisdiction over other claims asserted in the Plaintiffs' Third Amended Class Action Petition under 28 U.S.C. §§ 1331 & 1332, as well as 15 U.S.C. §§ 77v(a) & 77vvv(b).

7. This Notice of Removal is timely filed pursuant to 28 U.S.C. § 1446(b), because before Plaintiffs filed their May 17, 2005 Motion for Leave to File Plaintiff's Third Amended Class Action Petition, and the proposed amended petition attached thereto, Defendants could not ascertain that Plaintiffs would be alleging misrepresentations or omissions in connection with the purchase or sale of a covered security. Moreover, Plaintiffs did not actually file or serve the revised Third Amended Class Action Petition until on or after June 7, 2005.

8. Venue is proper in this District under 28 U.S.C. § 1441(a) and 15 U.S.C. § 78bb(f)(2).

9. Bank has obtained, and files herewith, the consent to removal of all other properly served defendants in this action. The signed consent of these parties is attached hereto. (Exs. 264 – 266.)

a. According to the State-Court Clerk's office, a summons has not yet been issued for defendant J.E. Liss & Company, Inc. or for defendant Jerome E. Liss. Accordingly they have not yet been served with process and joined as a defendant.

b. Defendant Marshall & Stevens, Inc. has consented to this removal and its consent is Exhibit 264 in the attached Exhibit Appendix.

- c. Defendants Michael J. Doster and Doster, Robinson, James, Hutchison & Ullom, P.C. have consented to this removal and their consent is Exhibit 265 in the attached Exhibit Appendix.
- d. Defendants Robert A. Chlebowski and Lynette A Frownfelter have consented to this removal and their consent is Exhibit 266 in the attached Exhibit Appendix.
- e. Defendant Varilease Corporation (“Varilease”) is not a proper defendant in this action and should not have been named in the Third Amended Class Action Petition. Varilease sought bankruptcy protection and was a debtor in the *In re Jacom Computer Services, Inc., Unicapital Corporation*, consolidated bankruptcy cases, Case Nos. 00-42719 through 42837 (CB) and No. 01-11617 (CB) in U.S. Bankruptcy Court for the Southern District of New York. Plaintiffs’ counsel sought to file a class proof of claim in that bankruptcy and to lift the automatic stay to pursue the claims against Varilease in this action. The Bankruptcy Court denied both applications. Thereafter, individual claims were filed pursuant to a special bar date and those bondholders who failed to file a proof of claim had their claims disallowed by court order dated November 15, 2002. (See Ex. 267 and Attachments (specifically disallowing claims of East Maine Baptist Church).) The claims of those who did file a proof of claim were disallowed by court order dated January 30, 2003. (Ex. 268.) Moreover, the Order Confirming Second Amended and Restated Plan of Reorganization, as Modified, of Unicapital Corporation and Debtor Subsidiaries Under Chapter 11 of the Bankruptcy Code stated that, as of the effective date of the plan, “**all Persons other than Litigation LLC will be permanently enjoined from commencing or continuing in any**

manner any action or proceeding (whether directly, indirectly, derivatively or otherwise) on account of or respecting any Causes of Action” (Ex. 269 at 23 (bold and underlining in original).) Bank has asked Plaintiffs’ counsel to amend their petition to dismiss Varilease, but Plaintiff’s counsel has not yet done that. Nevertheless, Bank contacted Varilease’s former bankruptcy counsel to attempt to obtain consent to this removal. Varilease’s former bankruptcy counsel stated that they now represent the liquidating trust for the consolidated bankruptcy cases and that Varilease is being dissolved subject to the three-year waiting period under Delaware law.

10. Pursuant to Local Rule 2.03, copies of all process, pleadings, and orders and other documents on file in the State Court are included in the Exhibit Appendix filed contemporaneously herewith.
 - a. Exhibit 1 is a copy of the State-Court Docket Sheet.
 - b. Exhibits 2 through 261 are the documents indicated on the State-Court Docket Sheet that were in the State-Court file.
 - c. Exhibit 262 is a list of the documents identified on the State-Court Docket Sheet that could not be located in the State-Court file.
 - d. Exhibit 263 is a list of documents that are in the State-Court file and were marked as filed, but that are not identified on the State-Court Docket Sheet.
 - e. Exhibits 263-A through 263-Z are the documents that are in the State-Court file and were marked as filed, but that are not identified on the State-Court Docket Sheet.

11. The current caption for this case has changed from the caption of the initial petition by way of amendment and because various defendants have filed third-party claims or cross-claims.

- a. By order dated June 2, 2005, Plaintiffs were granted leave to file a third amended petition. (Ex. 259.) Plaintiffs filed their Third Amended Petition on June 8, 2005. (Ex. 261.)
- b. Defendant Union Planters Bank, N.A. filed Union Planters Bank's Third Party Petition on May 3, 2001. (*See* Ex. 263-Z & Attachs. (Letter to Court enclosing file-stamped copy of Third-Party Petition not previously docketed or located in State-Court file).) Third-party-defendants J.E. Liss & Company, Inc. and Jerome E. Liss each moved to dismiss that petition (Exs. 138 (memo) & 139 (motion)), but that motion was denied March 3, 2005 (Ex. 240). None of those third-party defendants has yet filed an answer and their attorney was granted leave to withdraw on November 24, 2004. (Ex. 225.) Defendant Union Planters Bank, N.A.'s Motion for Default Judgment was filed March 17, 2005, and is still pending without response. (Ex. 242.)
- c. By order dated October 22, 2001, defendant Michael J. Doster, defendant Doster, Robinson, Hutchison & Ullom, P.C., and defendant Marshall & Stevens, Inc. were granted leave to file their Second Amended Third Party Petition. (Ex. 194; *see* Ex. 157 (Motion of Defendants Michael J. Doster and Doster, Robinson, James & Ullom, P.C., to Join in and Adopt by Reference "Defendant/Third Party Plaintiff Marshall & Stevens, Inc.'s Motion For Leave to File Second Amended Third-Party Petition" and "Defendant/Third Party Plaintiff Marshall & Stevens,

Inc.'s Second Amended Third-Party Petition").) That Third Party Petition was not separately entered on the State-Court Docket Sheet, but is attached to Defendant/Third-Party Plaintiff Marshall & Stevens, Inc.'s Motion For Leave to File Second Amended Third-Party Petition. (Ex. 155.) Third-party-defendants J.E. Liss & Company, Inc.; Liss Financial Services, Red Oak Financial , Inc.; and Jerome E. Liss each moved to dismiss that petition (Exs. 201 (motion) & 202 (memo)), but that motion was denied May 10, 2003 (Ex. 218). There is no answer filed by those third-party defendants in the State-Court file or reflected on the State-Court Docket Sheet and their attorney was granted leave to withdraw on November 24, 2004. (Ex. 225.) Third-party-defendants Kenneth E. Schimpf, Jr. and Tom Butenhoff also moved to dismiss that petition. (Exs. 203 (motion) & 204 (memo).) That motion was converted into a motion for summary judgment (Ex. 219), and was granted on February 15, 2005 (Ex. 233). A summons was issued for third-party defendant Mick McDermott on September 26, 2001(Ex. 180), but no return of service has been filed with the State Court and Mr. McDermott has not appeared in these proceedings. No summons has been issued for third party defendants William A. Glaser; Cutter & Company Inc.; David P. Bax; or Aragon Financial Services, Inc.

d. On July 23, 2003, third-party counter-defendant Marshall & Stevens, Inc. filed an answer to counterclaims of third-party counterclaimants J.E. Liss & Company, Inc. d/b/a Liss Financial Services and Jerome E. Liss. (Ex. 222.) This pleading is reflected in the minute entries on the State-Court Docket Sheet and a copy of the pleading is in the state court file and reproduced in the Exhibit Appendix hereto.

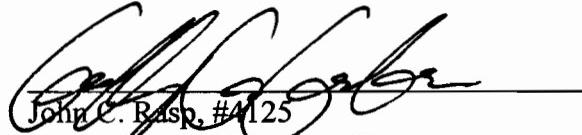
However, the State-Court Docket Sheet does not disclose the third-party counterclaim, nor is there a copy of that pleading in the State-Court file.

WHEREFORE, Defendant Union Planters Bank, N.A. respectfully gives notice that the above-entitled cause is removed from the Circuit Court of St. Louis County, Missouri to the United States District Court for the Eastern District of Missouri, Eastern Division.

Dated this 15th day of June, 2005.

BLACKWELL SANDERS PEPER MARTIN LLP

By:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that I caused a copy of the foregoing to be served by electronic transmission and/or first-class, U.S. mail, postage prepaid, the 15th day of June, 2005, as indicated below.

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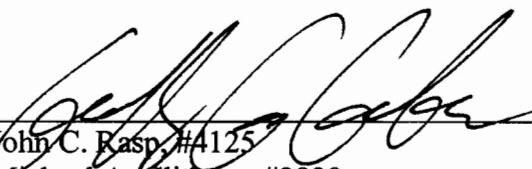
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